Response to Australian Human Rights Commission

OPCAT in Australia Consultation Paper

Advocacy for Inclusion

July 2017

About Advocacy for Inclusion

Advocacy for Inclusion acknowledges the Ngunnawal people as the traditional owners of the land on which we work.

Advocacy for Inclusion provides independent individual, self and systemic advocacy for people with disabilities.

Advocacy for Inclusion is a Disabled Peoples Organisation which means a majority of our board, members and staffs are people with disabilities. We represent Canberra's most marginalised and isolated people with disabilities, those with cognitive disabilities and/or significant communication barriers.

We act with and on behalf of individuals in a supportive manner, or assist individuals to act on their own behalf, to obtain a fair and just outcome for the individual concerned.

Advocacy for Inclusion works within a human rights framework and acknowledges the *United Nations Convention on the Rights of Persons with Disabilities*, and is signed onto the *ACT Human Rights Act*.

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July 2017

Summary of Recommendations

Recommendation 1: That Australia under OPCAT ratification ends the unwarranted use of restrictive practices for the management of people with disabilities by establishing legislative, administrative and support frameworks that comply with the OPCAT and the Convention on the Rights of Persons with Disabilities (CRPD).

Recommendation 2: In line with obligations in the CRPD and OPCAT, Australia establishes mandatory guidelines and practice to ensure that people with disabilities in institutional settings are provided with appropriate supports and accommodation under the OPCAT ratification.

Recommendation 3: The OPCAT must ensure it will be relevant and workable in the future and align with Australia's imminent human rights obligations to necessitate additional legislative powers, adequate resources and include field expertise.

Recommendation 4: Measures for documentation, benchmarking, evaluation, reporting and monitoring of restrictive practices and efforts to eliminate restrictive practices by the National Preventive Mechanism (NPM) must be included explicitly when presented to the UN Sub-committee on the Prevention of Torture (SPT).

Recommendation 5: NPM and SPT models must commit to a comprehensive audit of existing monitoring bodies and released publicly in compliance with UN treaties data collection on people with disabilities can be measured.

Recommendation 6: The National Preventive Mechanism (NPM) must include the development of legislative frameworks to mandate service providers to report all instances of restrictive practices to ensure access to places of detention and confinement, including Commonwealth or state disability discrimination commissioners, or state public advocate's offices under OPCAT obligations.

Recommendation 7: Article 31 of the CRPD – statistics and data collection – must be engaged by the OPCAT principles. It must be included in the National Preventive Mechanism (NPM) and reflected in measures through the UN Sub-committee on the Prevention of Torture.

Recommendation 8: Article 33 of the CRPD – national implementation and monitoring – must be engaged by the National Framework. It must be included in the Key Guiding Principles and reflected in measures outlined in the Core Strategies. This includes:-

- Designating independent mechanisms (i.e. the National Preventive Mechanism) to monitor restrictive practices, and promote the elimination of restrictive practices in accordance with the CRPD and OPCAT;
- Develop working practices that seek to progressively address issues in individual areas with experts on particular systemic issues across detention and restrictive areas, including civil society involvement.

Introduction

Advocacy for Inclusion is a not-for-profit non-government community organisation in the Australian Capital Territory. We provide individual, self and systemic advocacy services to people with disabilities to promote their human rights and inclusion in the community. We work directly with some of the most isolated people with disabilities. These are the people who are subjected to a range of restrictive practices.

Advocacy for Inclusion welcomes the opportunity to contribute to the Australian Human Rights Commission's consultation regarding the *Optional Protocol to the Convention against Torture* (OPCAT) in the context of restrictive practices used against people with disabilities in Australia and the ACT.

Advocacy for Inclusion supports the ratification of the OPCAT by Australia and welcomes the focus of the present consultation by the Australian Human Rights Commission. In particular, the National Preventive Mechanism (NPM) is seen as a useful oversight mechanism to protect the human rights of people with disabilities in indefinite detention, through its mandate to inspect places of detention and make recommendations to relevant authorities against restrictive practices.[1]

We acknowledge that the NPM is to be established within one year of the ratification of OPCAT; however it is a concern of the potential postponement of up to three to five years[2] after consultation with the UN Sub-Committee on the Prevention of Torture (SPT). Advocacy for Inclusion strongly recommends that the Commission pushes for the NPM as a matter of priority to ensure that places of detention and confinement are visited.

Background

People with disabilities in Australia are commonly subject to treatment that may be considered to constitute torture, or cruel, inhuman or degrading treatment or punishment, including persistent and severe violence and abuse, forced or coerced non-therapeutic sterilisation, long-term neglect of basic human needs, and painful and degrading behaviour modification techniques or 'restrictive practices'[3]. The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has articulated concern that, "in many cases such practices, when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognised as torture or other cruel, inhuman or degrading treatment or punishment".[4]

Over a number of years, Advocacy for Inclusion encountered numerous and regular instances of people with disabilities being chemically restrained as a form of restrictive practices in institutional settings. Usually this is done by sedating the person using prescription drugs. In some cases chemical restraint has been used as an alternative to addressing communications barriers or frustrations for years. Long term exposure to some of the drugs used can be damaging and may lead to additional serious health, including mental health, problems.

There is continuous strong evidence that staffing shortages in disability support services are contributing to the use of chemical restraint as workers either do not have time to, or are not skilled in, communicating effectively with people with communications barriers.[5] [6] There is no specific evidence that chemical restraint is being used

1 United Nations General Assembly 2002, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 19

2 Australian Human Rights Commission (2017) OPCAT Consultation Paper, Para. 24

3 Phillip French, Julie Dardel and Sonya-Price-Kelly, Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment, (People With Disability Australia, 2009) **Error! Bookmark not defined.**, 72

4 Manfred Nowak, Special Rapporteur, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 63rd sess, UN Doc A/63/175 (28 July 2008) 9.

5 Advocacy for Inclusion (2015) Submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings,http://www.advocacyforinclusion.org/Site%20Data/Publications/Submissions/2015/Submission_to_Senate_Inquiry_into_institutional_violence_against_FINAL.pdf

maliciously, or even knowingly, rather it appears that a culture has developed of using it as a convenient mechanism to work more quickly with people who are interpreted as being “difficult” or “challenging”. It seems to have become the cultural norm to make things easier for disability workers and health professionals.

The situations described below paint a picture where chemical restraint – the use of psychiatric medications – has been reported to Advocacy for Inclusion of people who are being quietened, calmed or in some way pacified by the use of strong medications. The behaviour of these people with disabilities is seen as inconvenient or challenging, rather than interpreted as an attempt to communicate or express normal emotions:

1. Several people with communications barriers have been sedated, usually ongoing, as their communication attempts became more vigorous as they tried to be heard. Specific examples include people with brain injury who are trying to express their concerns/feelings but their behaviour is interpreted as aggressive. Rather than being listened to they are sedated to “calm them down”. Some advocacy consumers have spent years not being listened to and being sedated. Once an advocate has worked through communicating with the person they have become calmer because they feel they are being heard.

2. People with disabilities experiencing pain, but who have not been believed or have been interpreted as “acting up” have been sedated to “quiet them down”. When visited by family or other community workers they have been observed to be heavily sedated, when the solution should have been to address the cause of pain and the existence of pain.

3. Some families have outlined the pressure they have been under to use sedation because their family member’s behaviour was “alarming or aggressive”. Despite the family not agreeing with this case managers have strongly advocated the use of sedation to “calm the person down”. Families contacting advocacy organisations with this situation have asked for assistance with finding community engagement activities and social support. They have interpreted the behaviour as boredom and an attempt to communicate frustration.

4. People with disabilities have reported to Advocacy for Inclusion about being threatened with sedation if they “don’t behave”. People have subsequently been subjected to inappropriate medication. To use such methods is clearly unacceptable. In most cases sedation is being threatened to avoid listening to the person and considering their wishes or opinion.

5. Advocates have been disturbed to see consumers who have been carrying untreated injuries or infections, but have been heavily sedated to the point of collapse. Rather than respond to the person’s attempts to get assistance staff have found the behaviour “difficult” and have further medicated them, without reference to the previous time of medication. This is potentially life threatening and is not an isolated case.

Restrictive practices are fundamentally violations of human rights. Such practices cause physical and psychological pain and distress, deprivation of liberty, and remove a person from their property.[7] These

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[6] Advocacy for Inclusion (2013) Submission to the Proposed National Framework for Reducing Restrictive Practices in the Disability Service Sector, http://www.advocacyforinclusion.org/Site%20Data/Publications/Violence/Advocacy_for_Inclusion_submission_to_National_Framework_on_Restrictive_Practices_June_2013_FINAL.pdf

[7] CRPD Civil Society. (2012). Disability rights now: Civil society report to the United Nations Committee on the Rights of Persons with Disabilities.

practices can have significant hostile impacts on the person's mental and physical health and wellbeing.[8] It also denies a person basic respect for their inherent dignity as human beings. Restrictive practices must be eliminated in order to fulfil the human rights and wellbeing of people with disabilities.

Restrictive practices "are the deliberate or unconscious use of coercive power to restrain or limit an individual's freedom of action or movement. There are five main forms of restrictive interventions: chemical, environmental, mechanical, and physical restraint, and seclusion." [9] Restrictive practices are fundamentally violations of human rights. They can cause physical and psychological discomfort or pain, deprivation of liberty, alter thought processes and deprive a person of their property.[10] These practices can have significant adverse impacts on the person's mental and physical health and wellbeing and this is evident in our daily work and expertise of knowledge.[11]

In spaces where people with disabilities have little control and choice, and where power is exercised over them to extreme degrees including through physical force, people with disabilities can become violent toward each other or toward support workers as a form of protest. This issue is often referred to as "challenging behaviours", and dealt with via restrictive practices, such as the use of psychotropic medications. It is often wrongly perceived that people with disabilities are safer in institutional settings where they are "cared for" and "with their own kind". In our experience, lateral violence is very common in institutional settings but is very poorly recognised as a serious issue with major impacts on people with disabilities[12].

Restrictive practices are used when people with disabilities to violence targeted at them, and as discussed earlier, in response to pain, discomfort, and unmet need and extreme powerlessness in institutional settings. Many people with disabilities in institutional settings have some form of communication impairment. This makes it difficult to articulate that they are being abused, or they are simply not listened to or believed because of discriminatory attitudes based on their disability.

Advocacy for Inclusion's experience tells us that restrictive practices are widely hidden from the broader community. The current system lacks accountability measures. Because restrictive practices have serious consequences and are a form of violence, these practices must be accounted for and strictly monitored, yet they are not. Support systems and services must be drastically improved so that people with disabilities are better supported to communicate and have their needs met in order to prevent the use of restrictive practices in the first place.

Advocacy for Inclusion strongly recommends that the National Preventive Mechanism (NPM), enacted through Australia's ratification of the OPCAT, ensures oversight and accountability for restraint and seclusion of people with disability, with a strong focus on prevention. Advocacy for Inclusion has previously recommended that a national oversight body for the use of restraint and seclusion be established[13] [14]. Further, this body should adopt a social justice lens to ensure that restraint and seclusion is accurately recognised as abuse and a

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[8] Spivakovsky, C. (2012). Restrictive Interventions in Victoria's Disability Sector Issues for Discussion and Reform. http://www.publicadvocate.vic.gov.au/file/Restrictive%20interventions%20discussion%20paper.

[9] Spivakovsky, C. (2012). *Restrictive Interventions in Victoria's Disability Sector Issues for Discussion and Reform*. http://www.publicadvocate.vic.gov.au/file/Restrictive%20interventions%20discussion%20paper.pdf

[10] CRPD Civil Society. (2012). *Disability rights now: Civil society report to the United Nations Committee on the Rights of Persons with Disabilities*.

[11] Spivakovsky, C. (2012). *Restrictive Interventions in Victoria's Disability Sector Issues for Discussion and Reform*. http://www.publicadvocate.vic.gov.au/file/Restrictive%20interventions%20discussion%20paper.

[12] Institutions include: Community based homes accommodating usually around 1 - 6 people with disabilities, which are run by services providing disability supports (group homes); Sheltered workshops, where people with disabilities are congregated together in a segregated workplace; Special schools or units – a segregated school environment or program for children with disabilities, both separate from and inside mainstream schools; Respite houses, where people with disabilities stay together for a short period to give their unpaid carers a break from caring responsibilities; Day centres, where people with disabilities are congregated together in a supported service setting to participate in recreational activities.

[13] Advocacy for Inclusion (2013) Submission to the Proposed National Framework for Reducing Restrictive Practices in the Disability Service Sector

[14] Advocacy for Inclusion (2015) Submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings

violation of human rights in group homes, congregate living arrangements and other institutional settings where people with disabilities are confined without choice and control.

Recommendation 1: That Australia under OPCAT ratification ends the unwarranted use of restrictive practices for the management of people with disabilities by establishing legislative, administrative and support frameworks that comply with the OPCAT and the Convention on the Rights of Persons with Disabilities (CRPD).

Recommendation 2: In line with obligations in the CRPD and OPCAT, Australia establishes mandatory guidelines and practice to ensure that people with disabilities in institutional settings are provided with appropriate supports and accommodation under the OPCAT ratification.

Recommendation 3: The OPCAT must ensure it will be relevant and workable in the future and align with Australia's imminent human rights obligations to necessitate additional legislative powers, adequate resources and include field expertise.

The Urgent need for data collection by the National Preventive Mechanism about people with disabilities in detention

Advocacy for Inclusion commends the discussion by the ACT OPCAT Roundtable session regarding accountability and transparency through reporting and monitoring measures and data collection as part of the National Preventive Mechanism (NPM). Advocacy for Inclusion continues to suggest that the principles of accountability and transparency should be included in the National Preventive Mechanism, whilst measures for documentation, benchmarking, evaluation, reporting and monitoring should be included explicitly within the UN Sub-committee on the Prevention of Torture (SPT).

To enhance accountability and transparency, additional legislative frameworks by the Commonwealth must be introduced to mandate service providers to report all instances of restrictive practices to an independent statutory body under OPCAT under inspection. If such measures are not developed, it is questionable that the ratification of the OPCAT could serve its purpose.

To enhance accountability and transparency, legislative frameworks must be introduced to mandate service providers to report all instances of restrictive practices to an independent statutory body. This is evitable when the NPM have a legislative mandate and will be provided resources to fulfil that mandate. If such measures are not developed, it is questionable that the OPCAT ratification could serve its purpose.

Recommendation 4: Measures for documentation, benchmarking, evaluation, reporting and monitoring of restrictive practices and efforts to eliminate restrictive practices by the National Preventive Mechanism (NPM) must be included explicitly when presented to the UN Sub-committee on the Prevention of Torture (SPT).

Recommendation 5: NPM and SPT models must commit to a comprehensive audit of existing monitoring bodies and released publicly in compliance with UN treaties data collection on people with disabilities can be measured.

Recommendation 6: The National Preventive Mechanism (NPM) must include the development of legislative frameworks to mandate service providers to report all instances of restrictive practices to ensure access to places of detention and confinement, including Commonwealth or state disability discrimination commissioners, or state public advocate's offices under OPCAT obligations.

Article 31 of the CRPD – statistics and data collection – requires that "States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention". Statistics and data collection should be used to identify and address the barriers experienced by people with disabilities in exercising their human rights, and data should

be disseminated to people with disabilities. This is highly relevant to the issue of restrictive practices, as practices that fundamentally violate human rights. Information gathered through inspection should be released publically to assess issues facing particular groups of people with disabilities, who may face heightened barriers to accessing their rights through experiencing multiple, or intersecting, disadvantage.

The UN Committee on the Rights of Persons with Disabilities recommends that Australia develops nationally consistent data collection and public reporting of disaggregated data across the full range of UN CRPD obligations under OPCAT, including the right to be safe from violence, and that all data be disaggregated by age, gender, disability status, place of residence and cultural background.[15] This is critical to gain a real understanding of the issue to support the development of policies and legislation that enable people with disabilities to access basic human rights, and to prevent violence against people with disabilities that is bridged on traumatic and inhuman treatment.

Recommendation 7: Article 31 of the CRPD – statistics and data collection – must be engaged by the OPCAT principles. It must be included in the National Preventive Mechanism (NPM) and reflected in measures through the UN Sub-committee on the Prevention of Torture

Article 33 of the CRPD – national implementation and monitoring – outlines states parties' obligations. This includes the establishment of focal points and coordination within government to facilitate action in different sectors and at different levels for the implementation of the CRPD. It involves the establishment of independent mechanisms to promote, protect and monitor implementation of the CRPD. The government is also required to fully involve people with disabilities and their representative organisations in the monitoring process. Restrictive practices violate human rights and so must be monitored in accordance with CRPD Article 33 in order to work towards implementation of the CRPD.

Recommendation 8: Article 33 of the CRPD – national implementation and monitoring – must be engaged by the National Framework. It must be included in the Key Guiding Principles and reflected in measures outlined in the Core Strategies. This includes:-

- **Designating independent mechanisms (i.e. the National Preventive Mechanism) to monitor restrictive practices, and promote the elimination of restrictive practices in accordance with the CRPD and OPCAT;**

- **Develop working practices that seek to progressively address issues in individual areas with experts on particular systemic issues across detention and restrictive areas, including civil society involvement.**

Broader systemic issues that the NPM should focus on, such as indefinite detention of people with cognitive disabilities

As stated in Paragraph 48 of the OPCAT Consultation Paper[16]: "In Australia, where robust legal and criminal justice frameworks exist, the general risk of torture is low" – although OPCAT prohibits cruel, inhuman and degrading treatment or punishment that falls short of the legal definition of torture, the risk is high where people with cognitive disabilities are being sent to prison. Risk is then high given high representation of numbers. 'Robust legal and criminal justice frameworks' have highly disadvantaged people with disabilities without measures of improvement.

[15] UN Committee on the Rights of Persons with Disabilities. (2013). Concluding observations on the initial report of Australia. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en
[16] Australian Human Rights Commission (2017) OPCAT in Australia: Consultation Paper, Para.48

People with disability in the ACT experience cruel, inhuman or degrading treatment or punishment in violation of Article 16 of the OPCAT through restrictive practices, institutionalisation and indefinite detention in prisons and mental health facilities. In our experience, we find that such practices may constitute torture due to vulnerability of the person with disability and other marginalising factors such as age, cultural background and gender.[17]

We recognise and advocate on behalf of people with disabilities in the ACT that represent the most marginalised of our Territory population. Aboriginal and Torres Strait Islander people, women with disabilities, people with cognitive impairment and people with psychosocial disabilities are particularly affected. People with disabilities are overrepresented in our prisons[18] [19], institutionalised in our communities[20], and placed into psychiatric wards[21] where the difference between a cognitive disability and mental illness is unacknowledged and blurred. Systemic failures that remain unaddressed are endemic in restrictive practiced used in disability services, with constant evidence that the denial of legal capacity that is compounded by guardianship and mental health-specific laws causes further breaches of human rights for people with disabilities.

Under Article 14 of OPCAT, people with disabilities are provided little option for redress due to lack of legislative protection from the systemic segregation, disempowerment and lack of equal access to justice. Advocacy for Inclusion sees many people with disabilities who experience ill-treatment; inhuman and/or punishing treatments in institutional environments, including prisons, without practical recourse apparent.

Conclusion

Advocacy for Inclusion welcomes the work towards ratification and implementation of the OPCAT in Australia to address the cruelty, inhuman treatment, indefinite detention and punishment of people with disabilities. This framework can play a key role in advancing the human rights of people with disabilities, particularly those most vulnerable to human rights abuses such as restrictive practices.

Clearly, eliminating restrictive practices must be the ultimate aim, in acknowledgement that restrictive practices are violations of human rights under OPCAT. The National Preventive Mechanism (NPM) should outline robust strategies, including the development of legislative frameworks, to improve accountability and transparency around these very serious practices.

The torture framework provided by the implementation of OPCAT in Australia provides a lens through which we can consider the issues of violence, abuse and discrimination against people with disabilities in a different light – especially when considered alongside the CRPD obligations Australia holds. This will also require holistic thinking by governments and community leaders in order to involve, educate and make accountable all sectors which engage with people with disabilities at risk of ill-treatment.

Thank you for the opportunity to participate in this consultation. Advocacy for Inclusion looks forward to further developments on the implementation of OPCAT in Australia and the ACT.

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[17] General Comment Number 2, Interpretation of Article 2 of the Convention Against Torture, page 6.
[18] Advocacy for Inclusion (2017) *Submission to: Senate Community Affairs Reference Committee Inquiry to address outcomes of National Disability Strategy 2010-2020*, http://www.advocacyforinclusion.org/Senate_CARC_Submission_to_address_outcomes_of_NDS_FINAL.pdf
[19] Advocacy for Inclusion (2013) *Submission to the Australian Human Rights Commission: Access to justice in the criminal justice system for people with disabilities*, http://www.advocacyforinclusion.org/images/Publications/Justice/Access_to_justice_in_the_criminal_justice_system_for_people_with_disabilities_August2013_FINAL.pdf
[20] Advocacy for Inclusion (2017) *Submission to: Senate Community Affairs Reference Committee Inquiry to address outcomes of National Disability Strategy 2010-2020*
[21] *Ibid*